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APR 2

No. 796

In the Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND COHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RUSSELL C. HARRINGTON, COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. 11-19) is reported in 263 F. 2d 466.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1959. (Pet. 11, 18.) The petition for a writ of certiorari was filed on March 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the books and records of a union, relevant to an investigation of its tax status over an 11-year period, could be examined under the summons provisions of the 1954 Internal Revenue Code even though they were in the physical possession of a Senate Committee, where the Committee had given its consent to such procedure.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

On May 2, 1958, a summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954 was served upon Raymond Cohen, secretary-treasurer of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the Union) requiring Cohen to appear before an officer of the Internal Revenue Service at the United States Courthouse, Philadelphia, Pennsylvania, to give testimony relating to the tax liability of the Union and to bring with him the books and records listed in the summons. The Commissioner of Internal Revenue at that time was investigating the tax status of the Union covering the period 1947 through 1957. (Pet. 13-14; R. 3a, 4a, 8a)[1]

[1] References designed "R" are to the appendix to appellant's brief in the Court of Appeals.

Cohen and the Union did produce and make available to the Service all the requested books and records which were then in his possession, explaining that he could not produce those for the period January 1, 1950, through September 26, 1957, because they were then (and at the time of the proceedings below still were) in the possession of the Senate Select Committee on Improper Activities in the Labor or Management Field of the United States Senate (hereinafter called the Committee).[2] (Pet. 14.)

The Union and Cohen were then advised by letter that the Commissioner would deem the summons sufficiently complied with if the Union would issue a letter addressed to the Commissioner or the Committee, authorizing the delivery of the books and records to the Service upon termination of the Committee's use thereof. The Union and Cohen, acting through counsel, in effect respectfully declined to issue such a letter.[3] (Pet. 14.)

Thereafter, the Commissioner instituted suit in the United States Court for the Eastern District of Pennsylvania to enforce compliance with the summons. The complaint (R. 3a-6a) recited the facts substantially as related above. The answer, among other things, averred that Cohen and the Union "neither neglected nor refused to obey the summons

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[2] The books and records in question were stored in Philadelphia under the control of the Committee. (Pet. 14.)

[3] As conceded in their brief below (p. 3), Cohen and the Union "preferred to exercise their legal rights to have the books and records returned to their possession prior to turning them over to the Internal Revenue Service and declined to execute such an authorization * * *".

heretofore issued * * * [but] have in fact expressed their willingness to comply when compliance becomes possible". (Pet. 14-15; R. 9a.)

The cause came on for hearing on complaint, answer, and affidavits before the District Court on motion of the United States for a preliminary injunction.[4] At the hearing before Judge Welsh, a letter from United States Senator James L. McClellan, Chairman of the Committee, addressed to counsel for the Government, was offered and received in evidence without objection. Part of the letter reads as follows (Pet. 15):

> In reply to your letter of September 18, 1958 regarding pending proceedings to compel Mr. Raymond E. Cohen and Local 107 of the Teamsters to turn over to the Government certain of its books and records, you point out that Judge Welsh desires some indication from this Committee whether a ruling would be considered or in-

[4] The motion sought, for the following reasons, to enjoin Cohen and the Union from receiving the books and records of the Union from the Committee in the event they were tendered by the Committee: (1) that the verified complaint previously filed with the District Court sought a mandatory injunction against Cohen requiring the execution of an authorization to permit the Committee to deliver the books and records in question directly to the Service, or requiring the Union to transmit the requested material to the Service immediately upon the Union's receipt of them from the Committee; (2) that the complaint had set forth adequate allegations requiring production of the books and records, and that there had been no compliance with the summons; and (3) that the United States and the Commissioner feared "that the information contained in the books and records sought might be lost, destroyed or tampered with * * *" (R. 6a-7a.)

terpreted as an interference with the proper functions of Congress.

* * * *

I deem it in the best interests of the rank and file members of this local, as well as in the best interests of the country, that the books and records of Local 107 be preserved intact and that the records now in the possession of the Committee be turned over to the Internal Revenue Service by order of the Court. Such ruling by the Court would be considered by the Committee Chairman clear cooperation between the Legislative, Executive, and Judicial branches of the Government and such ruling would, in the Chairman's opinion, in no wise impinge upon or interfere with the proper functions of Congress.

At the conclusion of the hearing, Judge Welsh entered an order which, in part, provided as follows (Pet. 16):

IT IS THEREFORE ORDERED, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and

IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agent or representative, shall not remove or cause to be re-

moved the aforesaid records and documents from the custody of the Committee until further order of the Court.

On appeal, the Court of Appeals concluded that since the Committee in effect had consented to the entry of an appropriate order giving it authority to turn over the Union's books and records to the Service, or giving the Service access to them for the stated purposes, the District Court's order should be modified to conform to the record, and further, that Cohen and the Union should be restrained from interfering with or preventing the Service's examination, copying, and photographing the books and records in the hands of the Committee.[5] (Pet. 16.) Accordingly,

[5] Thereafter, in the view of the Court of Appeals, Cohen and the Union would be entitled to have the books and records returned to them. (Pet. 16.) In this connection, it may be appropriately noted here that the Union had previously brought an action in replevin in the United States District Court for the District of Columbia against the Committee for the return of the Union's books and records (*Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *McClellan, et al.*, Civil Action 188-58). The Commissioner sought to intervene therein in order to enforce compliance with the summons (R. 52a-54a); the motion to intervene was denied (R. 55a). A final decision on the merits in the replevin suit has not yet been handed down. The Court of Appeals in the instant case held that the denial of the motion to intervene was not, as the petitioners contended below, an adjudication on the merits with respect to the issue here involved. (Pet. 17.) On January 26, 1959, this Court denied (358 U.S. 947) a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the District Court's denial of a prelim-

it affirmed the order of the District Court, subject to modification of the second and third paragraphs thereof, to read as follows (Pet. 18-19):

> IT IS THEREFORE ORDERED, the Senate Select Committee on Improper Activities in the Labor or Management Field having consented, pursuant to the authority granted to the Court by Sections 7402 and 7602 of Title 26, that the Internal Revenue Service shall have the authority and is hereby granted the right to examine, inspect, copy and photograph the books and records of Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and
>
> IT IS FURTHER ORDERED that the aforesaid Raymond Cohen and Local 107, Highway Truck Drivers and Helpers Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its agents and representatives, are hereby enjoined from interfering with or preventing the Commissioner of Internal Revenue, or the Internal Revenue Service, from examining the books and records in the hands of said Committee until further order of Court.

ARGUMENT

In holding that Internal Revenue Service personnel investigating "the tax status of the union covering

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inary injunction to restrain the Committee from authorizing or permitting the District Attorney for Philadelphia County, State of Pennsylvania, to inspect, examine, and copy records of Local 107, pursuant to a subpoena *duces tecum* issued by the Committee.

the period 1947 through 1957" (Pet. 13) could examine books and records of Local 107 which were in the custody of the Senate Committee, the decisions below properly implement statutory provisions which permit the Secretary or his delegate, through the issuance of a summons, "To examine any books, papers, records, or other data which may be relevant or material to such inquiry" (Section 7602 of the Internal Revenue Code of 1954, Appendix, *infra*), and which bestow upon the District Courts not only the general power "to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws" (Section 7402(a) of the Internal Revenue Code of 1954, Appendix, *infra*), but also the specific power, where a summons has been issued, "by appropriate process to compel * * * production of books, papers, or other data" (Section 7402(b) of the Internal Revenue Code of 1954, Appendix, *infra*) and "to enforce obedience to the requirements of the summons" (Section 7604(b) of the Internal Revenue Code of 1954, Appendix, *infra*). Such powers are to be broadly construed in the light of the important objects sought to be achieved. *Falsone* v. *United States*, 205 F. 2d 734, 742 (C.A. 5th), certiorari denied, 346 U.S. 864; cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322. Indeed, as the Court of Appeals for the First Circuit stated in *Brody* v. *United States*, 243 F. 2d 378, 384, certiorari denied, 354 U.S. 923, in considering the same provisions, "It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers

to compel compliance with the internal revenue laws".

The books and records sought to be examined in the instant case were germane to the investigation undertaken by the Service.* No constitutional question was seriously raised below, and clearly the investigation was not "out of proportion to the end sought." *Zimmermann* v. *Wilson*, 105 F. 2d 583, 585 (C.A. 3d). In fact, as the Court of Appeals stated, the Union and Cohen had claimed below that the "physical impossibility" of complying with the summons was the "sole reason for the failure to produce." (Pet. 18.) But the petitioners could have complied if, as requested, they had executed an "authorization • • • to enable the Committee to deliver the books and records to the Internal Revenue Service upon the termination of its use." (R. 5a.) In any event, the Senate Committee itself had eliminated any question as to the availability of the material sought by acknowledging, in effect, that it was amenable to the entry of an order "giving the Committee authority to turn over the books

* Paragraph XII of the complaint alleged "that the books and records currently in the control of the Committee are necessary for this investigation." (R. 5a.) Paragraph 12 of the Answer "Admitted" the allegation, noting, however, "that inasmuch as the Union is a tax-exempt organization • • • it has no tax liability subject to investigation." (R. 9a.) But whether it was such an organization was in itself a proper subject of investigation (cf. *Application of United States (Carroll)*, 246 F. 2d 762 (C.A. 2d), certiorari denied, 355 U.S. 857); and, as the Commissioner alleged in his attempt to procure enforcement of the summons in the intervention proceedings in the District of Columbia, he was "investigating the tax-exempt status of the plaintiff labor union covering the period of 1947 through 1957." (R. 52a.)

and records of defendants to the Internal Revenue Service, or giving the latter access to them for the purposes stated." (Pet. 16.) In this state of the facts, the case before the District Court was in substance not materially distinguishable from the fairly conventional situation in which books and records of an individual or corporation, in the possession of a third party, are regularly subjected, without question, to the reach of an Internal Revenue summons requiring their production in connection with a tax investigation of the owner of the books and records.[7]

Contrary to their view concerning "the heart of this entire case" (Pet. 6), petitioners, both in sub-

[7] Given the right of the Service to examine the records of the Union which were in the custody of the Senate Committee, it follows that the injunction issued below was fully warranted. The motion for a preliminary injunction alleged that there was "fear that the information contained in the books and records sought might be lost, destroyed or tampered with" (R. 7a). Basis for the apprehension may be found in the affidavit of the Federal Bureau of Investigation handwriting expert (R. 41a-48a) who found certain alterations and changes in the records of the union which were before the Senate Committee. In addition, Senator McClellan's letter to the United States Attorney, Plaintiff's Exhibit No. 3 before the District Court (R. 48a-50a), in expressing the view that it was "in the best interests of the rank and file members of this local, as well as in the best interests of the country, that the books and records of Local 107 be preserved intact and that the records now in the possession of the Committee be turned over to the Internal Revenue Service by order of the Court", pointed out, among other things, that "[d]uring the course of our hearings there were strong indications of misuse and manipulation of union funds"; that there was "evidence that some checks had been forged"; and "that certain records and checks were missing and unaccounted for."

stance and effect, did refuse to comply with the summons when, as the Court of Appeals stated (Pet. 14), "acting by their counsel, [they] respectfully declined * * * in so many words, although their language is equivocal", to execute the requested authorization. Also, contrary to petitioners' contention (Pet. 8), they did have sufficient "control" to cause compliance with the summons because they could have effected the transfer of the books and records from the Committee to the Service by executing the requested authorization. Cf. *Grant Foster & Foster Construction C.A.* v. *United States*, decided March 16, 1959 (C.A. 2d).

Nor, as petitioners further assert (Pet. 9), did the District Court's order, as modified below, deprive them of the right "to raise proper objections to the sufficiency of the Summons." As noted above, the Court of Appeals regarded this contention as "inconsistent" with petitioners' sole claim in the District Court. (Pet. 18.) Moreover, both courts below presumably found ample warrant in the record to support the conclusion that the books and records were necessary to the inquiry; and, as to the statute of limitations, if the anticipated investigation revealed that fraud had been perpetrated, the running of the statute of limitations would be barred as a defense in any subsequent action. "The Commissioner is * * * entitled to the examination if it may shed light on whether a liability still exists or whether it has been time-barred." *Grant Foster & Foster Construction C.A.* v. *United States, supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1959

APPENDIX

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7402.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any

person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data; and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance,

testimony, or production of books, papers, records, or other data.

(b) [as amended by Sec. 4(i), P. L. 466, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, 70 Stat. 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7604.)

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